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APR 18 1930
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. ~~772~~ 68

MILLER BROTHERS COMPANY,
Petitioner,

against

LEKTOPHONE CORPORATION,
Respondent.

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TABLE OF CASES CITED.

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MILLER BROTHERS COMPANY,

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vs.

LEKTOPHONE CORPORATION,

Respondent.

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

This brief is not filed in opposition to the issuance of the writ prayed for. Respondent has no objection to the issuance of the writ if this Court is disposed to consider the instant case at the same time that it considers the *Rola case* which is now by writ of certiorari to the Court of Appeals of the Ninth Circuit on the docket of the Court.

This brief is filed because we think that the petition, and the brief in its support, do not correctly state the issues as to which conflict exists; or the extent to which the issues in the instant case are embraced within that conflict.

The opinion of the Court below, the District Court for the District of Delaware, is published at 37 Fed. (2d), 580, and is printed in the record at pages 13-16.

This Court, on January 27, 1930, issued a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in *Lektophone Corporation* vs. *The Rola Com-*

pany on the petition of Lektophone Corporation. The ground stated in Lektophone Corporation's petition for that writ was, that

> "A conflict as to the scope of patent claims, on substantially the same evidence of prior art and substantially the same type of accused device exists between the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Third Circuit."

The conflict did not go to the validity of the patent; only to its scope.

The conflicting decisions were *Lektophone Corporation* vs. *The Rola Company*, 34 Fed. (2d), 764 (C. C. A., 9), and *Lektophone Corporation* vs. *Brandes Products Corporation*, 20 Fed. (2d), 155 (C. C. A., 3).

In the instant case the accused devices are essentially the same as in the *Brandes case* and as in the *Rola case*. The case went to final hearing before Morris, D. J., at Wilmington, Delaware, in May, 1929. The same defenses were presented as in the *Brandes case*, plus an additional defense under R. S., 4897.* On January 23rd, 1930, Judge Morris filed an opinion (37 Fed., 2d, 580, p. 581, and Rec., p. 14) in which he said:

> "The evidence in the case at bar differs in no substantial particular from that in Brandes case. Hence, the decree of this Court, in the pending case, must be dictated by the decision of the Circuit Court of Appeals in the Brandes case unless the defense, here made for the first time, under R. S., 4897 is sound."

He then went on to hold that the new defense was unsound and sustained the complaint.

Appeal has been perfected to the Circuit Court of Appeals for the Third Circuit in the instant case, and

*Quoted in petitioner's brief, page 6.

petitioner asks this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Third Circuit before that Court has passed on the case. Jurisdiction is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347), which is as follows:

> "Sec. 347. Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the case had been brought there by unrestricted writ of error or appeal."

The cases cited in petitioner's brief (p. 5) are not cases in which the writ of certiorari was issued before judgment or decree by the Court of Appeals. However, the power to issue the writ at that stage of a case pending in the lower court seems to be expressly included in this section of the Judicial Code and it seems to have been exercised by this Court in *White* vs. *Mechanics Securities Corporation, etc.*, 269 U. S., 283.

Respectfully submitted,

William H. Dunn

Counsel for Respondent.